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THE GERRYMANDERING OF STATE AND FEDERAL LEGISLATIVE DISTRICTS†

By NEIL TABOR*

I. INTRODUCTION

The apportionment of representatives to legislative bodies and the rearrangement of the districts from which they are elected have always presented difficult legal and political problems.¹ It has been said that "Scarcely any right more nearly relates to the liberty of the citizen and the independence and the equality of the freeman in a republic than the method and conditions of his voting and the efficacy of his ballot, when cast, for representatives in the legislative department of Government."² Though it is generally assumed that equality of representation according to population is a desirable objective,³ it is nevertheless a

† This article, originally prepared as a term paper for Professor Paul A. Freund's Seminar in Constitutional Litigation at Harvard Law School in 1952, has been revised and recently brought to date by the author who, while taking full responsibility for the views expressed, wishes to thank Professor G. Kenneth Reiblich of the University of Maryland Law School, and Melvin J. Sykes, of the Baltimore City Bar, for their advice in its final preparation.

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Although the terms are sometimes used interchangeably in the cases, reapportionment refers to the allotment to each legislative district of its quota of representatives, while redistricting refers to the rearrangement of the boundaries of such districts. In a relatively large number of instances, the distinction is unnecessary due either to the existence of single member districts, or the allotment of representatives to a fixed political subdivision within a state, such as a county. In the former, only a periodic redistricting is required, while in the latter only reapportionment is necessary.


⁴ Of course, not all legislative bodies are established on this principle. Representation according to states in the United States Senate is often
fact that the widespread gerrymandering of legislative districts in this country has resulted in the partial disfranchisement of a large portion of the electorate.4

In the broadest sense of the term, any reapportionment or redistricting smacking of political skullduggery may be termed a gerrymander. In a more limited sense, gerrymandering has been defined as a partisan arrangement of election districts to secure an unfair advantage for one political party (or other interest) within a state.5 The dominant political party in the state legislature generally accomplishes this objective by spreading its potential voting strength over a relatively large number of districts and concentrating the opposition voters in as few as possible.6

historically defended on the basis that, as a compromise between the large and small states, the Senate was established as that organ of the national legislature which was to represent thirteen formerly sovereign states. Whatever merit this may have on a national scale, it is generally true that as far as the individual states are concerned, the cleavage of interests among geographic subdivisions within a state is far less marked than the differences among the states themselves. Moreover, the typical county or township within a state is more a useful local administrative device than a governmental body having any of the attributes of sovereignty.

4 One commentator has concluded that the gerrymandering of legislative districts “practically adds up to a state-wide system of rotten boroughs”. Neuberger, Our Gerrymandered States, The Nation 127 (Feb. 1, 1941). For other popular treatments of the subject, see Welsh, Government by Yokel, 3 American Mercury 199 (1924), and Neuberger, Last Stand of Rotten Boroughs, The Progressive 9 (June 10, 1948). Gerrymanders have, in some cases, proven so effective that a political party receiving a bare majority or less of the total vote has been able to elect an entire slate of Congressmen. See e.g., Short, Congressional Redistricting in Missouri, 25 Am. Pol. Scd. Rev., 634-49 (1931).

5 WEBSTER’S NEW INTERNATIONAL DICTIONARY (2nd Ed.) 1052; ENCYCLOPEDIA BRITANNICA, Vol. 10 (1945), 1314.

6 This has, of course, led to the formation of such irregularly shaped legislative districts as the Mississippi “shoestring” (which has effectively neutralized Negro and Republican votes by isolating a large portion of those groups in an area 300 miles long and 20 miles wide) and the Illinois “saddlebag” (composed of groups of counties on opposite sides of the state joined by a narrow strip of land, which has successfully concentrated many Democratic voters within a single district). Historians report that the word “gerrymander” is derived from the supposed resemblance of an 1812 Massachusetts district to a salamander. During the administration of Governor Elbridge Gerry, Jeffersonian Republicans divided the State Senatorial Districts in such a way that, with less than a majority vote, they elected nearly three-fourths of the members. An artist found that a coastal district in Essex County could by the addition of wings, teeth and claws be made to resemble some fabulous monster. “How’s that for a salamander?” he said to a bystander, who retorted, “Better call it a Gerrymander!” See GARYRIZ, THE RISE AND DEVELOPMENT OF THE GERRYMANDER (1907), Chapter I, which traces the gerrymandering of legislative districts from colonial times through 1840 and establishes that the device was commonly employed long prior to 1812.
Thus, while the former will have small, but supposedly safe, majorities in a large number of districts, the latter will control only a few districts in which they are likely to amass overwhelming pluralities.\(^7\) To further assure the desired result, the districts with a majority of opposition voters generally contain a larger proportion of the electorate than those which are considered "safe" by the party in power.\(^8\) Frequently, this latter device is employed to secure overrepresentation for rural at the expense of urban areas within a state.\(^9\)

Gerrymandering may also result from legislative inaction. In many states reapportionment and redistricting acts, though equitable at the time of their enactment, may become highly inequitable due to the shiftings of population. As a result of legislative failure to make periodic readjustments for such changes in population, all the vices of a gerrymander soon appear and population disparities among districts have in many cases become progressively greater over the years.\(^10\)

The evils of legislative gerrymandering extend far beyond individual dilution of voting strength and favoritism of the dominant political machine. For example, per-

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\(^7\) Of course, when this is employed in any extreme degree, there is always the very real danger that any appreciable trend toward the opposition party may well result in the virtual unseating of the party which has contrived the gerrymander. See Ray, Introduction to Political Parties and Practical Politics (1924), 462, 497-50; Brooks, Political Parties and Party Politics (1933), 473-82.

\(^8\) According to the 1950 census figures, in some fifty Congressional districts, members of the House represent about 250,000 constituents each, while approximately fifty other representatives speak for 450,000 or more. In Arkansas, California, Florida, Georgia, Illinois, Maryland, Michigan, Mississippi, Missouri, Ohio, Oklahoma, Pennsylvania, South Dakota, and Texas, the largest district has more than twice the population of the smallest. See, States Called on to Redistrict for Congress, 40 Nat. Munic. Rev., 92-3 (1951), and Appendix I to Colegrove v. Green, 328 U. S. 549, 557-9 (1946).

\(^9\) See Walter, Reapportionment and Urban Representation, 195 Annals 11-20 (1938).

\(^10\) The largest disparity after the 1950 census was in Illinois where, due to the legislative failure to validly reapportion Congressional districts since 1901 (infra, n. 53) the smallest district contained less than 175,000 while the largest exceeded 900,000. Colegrove v. Green, supra, n. 8. See Mott, Reapportionment in Illinois, 21 Am. Pol. Sci. Rev., 598 (1927), tracing legislative movements for a new act.
mitting general overrepresentation of rural-agrarian interests in state legislatures has enabled those groups to dominate the more populous urban-industrial sections.\textsuperscript{11} The combination of the gerrymander with another political device — the party caucus — may prove so effective that representatives of a scant portion of the total population may be able to exert an absolute veto over any proposed legislation.\textsuperscript{12} Gerrymandering of legislative districts also is reflected in overall party organization. In many states, apportionment of delegates to state conventions as well as representation on state committees is based on legislative districts. Perhaps even more significant is the influence of the gerrymander upon the process of constitutional amendment. Varying of course with the degree of control exerted by the legislature over the amending process is the ability of a gerrymandered legislature to maintain the status quo by successfully opposing constitutional reforms of state apportionment and districting procedures.\textsuperscript{13}

II. STATE LEGISLATIVE DISTRICTS

A. Constitutional Provisions. Each of the forty-eight state constitutions contains provisions dealing with the re-apportionment and redistricting of state legislative districts. The great majority of them provide that the apportioning agency should be the state legislature.\textsuperscript{14} In a few states, including Arizona, Indiana, Massachusetts, Michigan, Missouri and New York, county boards or similar local

\textsuperscript{11} Supra, n. 9.
\textsuperscript{12} In 1950, under the self imposed rule of the Republican Senators in the New Jersey Senate, no bill or name of a prospective appointee could be reported to the floor by a committee unless released by affirmative vote of eleven of the fourteen Republican Senators in a secret caucus. The effect of the caucus rule was to enable four senators representing counties with about three per cent of the total state population to veto any proposed legislative action. See editorial, Where Caucus is Still King, 39 Nat. Munic. Rev. 119 (1950).
\textsuperscript{13} Cf. infra, n. 29.
\textsuperscript{14} See, Durfee, Apportionment of Representation in the Legislature; A Study of State Constitutions, 43 Mich. L. Rev. 1091 (1945), for table at 1104-1112.
agencies have been delegated or constitutionally empowered to divide counties into legislative districts, after an apportionment of representatives has been made by the legislature. In two states, Arkansas and Ohio, boards composed of executive officials perform the apportioning function. Provisions regarding the number of members of each legislative chamber, the basis of apportionment (whether by districts, counties, towns, etc.) and the time prescribed for reapportionment are also set forth with particularity in almost all state constitutions.

A majority of the state constitutions also contain express provisions designed to check the worst forms of gerrymandering. Among these the most common requirements are that the population of election districts must be equal (or "as nearly as may be" or "as practicable") and that the territory forming an election district must be contiguous and compact. A few state constitutions also contain express provisions authorizing the validity of apportionment statutes to be tested at the suit of any citizen in an original proceeding in an appellate court, and directing the court to

15 Held to constitute a constitutional delegation of power by the legislature in Board of Com'rs. v. Jewett, 184 Ind. 63, 110 N. E. 553 (1915).
16 E.g., Arizona Const., Art. IV, Part 2, Sec. 1 (1).
17 Ariz. Const., Art. VIII, Sec. 1 (Board of Apportionment Commissioners consisting of the Governor, Secretary of State and Attorney General); Ohio Const., Art. XI, Sec. 11 (Board consisting of Governor, Auditor, and Secretary of State, any two of whom are empowered to act.)
18 Durfee, loc. cit., supra, n. 14, and Shull, Legislative Apportionment and the Law, 18 Temple U. L. Q. 388, 397-8 (1944). The constitutions of most states place a duty on the state legislature to reapportion after each federal census. A few others merely empower their legislatures to reapportion, but do not do so in mandatory terms. See e.g., Minn. Const., Art. IV, Sec. 23.
19 In Maryland, these requirements are made applicable to Baltimore City only by Article III, Sec. 2 of the Constitution which provides in part that, "The City of Baltimore shall be divided into six legislative districts as near as may be of equal population and of contiguous territory, . . ." In states whose constitutions do not expressly require equality among districts, equality may nevertheless be implied by the usual requirement that apportionment is to be according to population. But the inclusion of an express provision that legislative districts should be as nearly equal in population as practicable may be important due to the fact that some courts have been more willing to act on the basis of such an express provision. See, e.g., Brown v. Saunders, 159 Va. 28, 166 S. E. 105 (1932). Another less commonly employed provision designed to assure population equality is that "No county shall have more members of assembly than a county having a greater number of inhabitants, excluding aliens." N. Y. Const., Art. III, Sec. 5.
give precedence to such a proceeding over all other pending cases.\textsuperscript{20}

A few states have also adopted constitutional provisions expressly designed to overcome the possibility of gerrymandering through legislative inaction. In Florida, the state constitution provides that should the legislature fail to act within a stated time, the Governor shall call the legislature into special session, where it is "mandatorily required to reapportion".\textsuperscript{21} The Constitutions of California, South Dakota and Texas provide that, upon the failure of the legislature to act, a special executive board is to reapportion or redistrict the state.\textsuperscript{22} In Arkansas, where the duty to reapportion is vested in an executive board,\textsuperscript{23} the constitution permits any citizen and taxpayer to compel the board to act by mandamus or otherwise.\textsuperscript{24} The Maryland constitution, in allowing the voters to decide every twenty years whether to have a constitutional convention, at least opens the door periodically to constitutional redistricting.\textsuperscript{25}

On the other hand, some state constitutional provisions have the effect of fostering inequality among election districts. For example, such inequalities inevitably result from the fairly common provision prohibiting the division of a county in the formation of a legislative district, especi-

\textsuperscript{20}Ark. Const., Art. VIII, Sec. 5; N. Y. Const., Art. III, Sec. 5; Okl. Const., Art. V, Sec. 10(j). Although the New York and Oklahoma constitutions provide that review shall be subject to such reasonable regulations as the legislature shall prescribe, cases in both states have held that the courts might review apportionment acts notwithstanding the failure of the legislature to prescribe regulations. Jones v. Freeman, 193 Okl. 554, 146 P. 2d 564 (1943), app, dis. 322 U. S. 717 (1944); In re Sherrill, 188 N. Y. 185, 81 N. E. 124 (1907).

\textsuperscript{21}Fla. Const., Art. VII, Sec. 3. It is further provided that such session shall not terminate until a reapportionment is enacted, and shall consider no other business.

\textsuperscript{22}Calif. Const., Art. IV, Sec. 6 (Governor, Attorney-General, Secretary of State, Superintendent of Public Instruction); S. D. Const., Art. III, Sec. 5 (Governor, Secretary of State, Attorney-General, Superintendent of Public Instruction, Presiding Judge of the Supreme Court). Texas Const., Art. III, Sec. 28, discussed in McClain, Compulsory Reapportionment, 40 Nat. Munic. Rev., 305-7, 324 (1951).

\textsuperscript{23}Supra, n. 17.

\textsuperscript{24}Ibid. Art. VIII, Sec. 5.

\textsuperscript{25}Infra, n. 29.
ally when it is also provided that each county shall elect a minimum number of representatives. Another somewhat less common provision producing inequalities among districts is that which provides for apportionment of representatives in one or both houses of the state legislature according to constitutionality fixed progressive ratios of population.

Perhaps the most striking form of potential "constitutional gerrymandering" is illustrated by Article III, Section 5 of the Maryland Constitution which fixes the number of legislators to represent each county in the House of Delegates. Since no provision is made for any reapportionment to meet future population changes among counties, the only means for reappor
tioning representatives is through the cumbersome process of constitutional amendment. Although the Constitution likewise allots a fixed number of delegates to represent each of the legislative districts in Baltimore City, the General Assembly is expressly empowered to equalize future population disparities among the City's districts by changing the boundaries of such districts from time to time.

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26 Sec. e.g., N. C. Const., Art. II, Sec. 5.
27 In Maine, for example, Senatorial Districts are to be apportioned as follows: Each county having a population of 30,000 or less is to have one Senator; each county having from 30,000 to 60,000 is to have two Senators; each county having from 60,000 to 120,000 is to have three Senators; while each county having from 120,000 to 240,000 is to have four Senators; and any county having more than that is apportioned five Senators. Me. Const., Art. IV, Part 2nd, Sec. 1.
28 The Delaware Constitution (Art. II, Sec. 2) similarly apportions members of the state legislature.
29 The Maryland Constitution (Art. XIV, Sec. 2; Art. XVII, Sec. 9) provides that, once every twenty years, the voters shall decide whether or not to call a constitutional convention. If approved, the General Assembly is to call a convention for the purpose of amending the Constitution, provided no such amendments shall become effective until approved by the voters. The electorate in November 1950 voted in favor of calling a convention by an overwhelming plurality, but the Assembly failed to call a convention, due (according to editorial criticism at the time) to the fact that the smaller counties feared that the convention would reappor
tion the House of Representatives and thereby give control of the House to the more populous counties and Baltimore City. Editorials, Baltimore Sun, December 12, 1950, p. 16; December 23, 1950, p. 10.
30 Art. III, Sec. 4:
   "... the General Assembly shall have power to provide by law, from time to time, for altering and changing the boundaries of the existing legislative districts of the City of Baltimore, so as to make them as near as may be of equal population; but said districts shall always consist of contiguous territory."
B. Judicial Review of Legislative Enactments. Although it is sometimes contended that state legislative reapportionment and redistricting acts are political matters beyond the scope of judicial review, it is now universally recognized that the validity of such enactments is a proper subject for judicial inquiry. In the infrequent instances where a mandatory requirement of a state constitution has been violated in establishing districts or apportioning representatives, the courts have shown no hesitancy in granting relief. However, in the great majority of cases where legislative acts have been challenged because of alleged nonconformity to those constitutional standards which can never be absolutely and exactly attained, such as compactness, contiguity and equality of population, the courts have traditionally been reluctant to substitute their judgment for that of the legislature. In case after case involving asserted population disparities among districts, the courts have consistently refused to set aside apportionment acts unless the inequalities among districts were so gross

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32 Adams v. Forsythe, 44 La. Ann. 130, 10 So. 622 (1892) [holding invalid an act increasing the total number of representatives beyond the maximum fixed by the constitution]; State v. Bricker, 139 Oh. St. 499, 41 N. E. 2d 377 (1942) [setting aside an act which divided former state senatorial districts into two or more new districts although the newly created districts had less than the requisite three-fourths senatorial ratio]; Morris v. Wrightson, 56 N. J. L. 126, 28 A. 56 (1883) [invalidating an act dividing counties into assembly districts and providing that the residents of each district might vote for only one assemblyman where the constitution provided that the assemblymen representing each county should be elected by all the voters residing in the county].

33 See cases cited in Annotation cited, supra, n. 31. The overwhelming majority of the cases have involved alleged inequalities in population among districts. Only a few have involved the requirements of compactness and contiguity: People v. Thompson, 155 Ill. 451, 40 N. E. 307 (1895); In re Dowling, 219 N. Y. 113 N. E. 545 (1916).
as to show an almost total disregard of constitutional limitations.\(^4\)

Various reasons have been assigned for the judicial recognition of a wide latitude of legislative discretion. The courts have, in general, recognized that it is virtually impossible to observe county, or other constitutionally prescribed geographic units, and obtain districts approximately equal in population.\(^5\) Furthermore, in redistricting a state, the apportioning body is assumed to be thoroughly familiar with the territory, including its cities and towns, its topography and means of communication.\(^6\) In addition, the courts have been traditionally reluctant to question the motives or alleged lack of wisdom of the legislature, it being quite frequently stated that it is virtually impossible to enact any new apportionment or revision of legislative districts which is not the subject of adverse criticism and of alleged possible improvement.\(^7\) Finally, there is a tacit

\(^{4}\) The following chart lists comparative population figures where legislative reapportionment acts have been invalidated. (The unit of representation is the population of the theoretically perfect district.)

\textbf{State Apportionment Acts Held Invalid}

<table>
<thead>
<tr>
<th>State Apportionment Acts Held Invalid</th>
<th>Unit of Representation</th>
<th>Largest District</th>
<th>Smallest District</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ragland v. Anderson, 125 Ky. 141, 100 S. W. 865 (1907)</td>
<td>21,471</td>
<td>53,263</td>
<td>7,047</td>
</tr>
<tr>
<td>Stiglitz v. Schardlen, 239 Ky. 799, 40 S. W. 2d 315 (1931)</td>
<td>65,000</td>
<td>128,595</td>
<td>39,210</td>
</tr>
<tr>
<td>State v. Cunningham, 81 Wisc. 440, 51 N. W. 724 (1892)</td>
<td>51,117</td>
<td>65,962</td>
<td>30,732</td>
</tr>
<tr>
<td>State v. Cunningham, 83 Wisc. 90, 53 N. W. 35 (1892)</td>
<td>51,117</td>
<td>68,601</td>
<td>38,690</td>
</tr>
<tr>
<td>People v. Board of Sup'rs., 138 N. Y. 95, 33 N. E. 227 (1893)</td>
<td>55,237</td>
<td>102,805</td>
<td>31,685</td>
</tr>
<tr>
<td>Rogers v. Morgan, 127 Neb. 456, 256 N. W. 1 (1934)</td>
<td>13,779</td>
<td>21,181</td>
<td>8,094</td>
</tr>
<tr>
<td>Brooks v. State, 162 Ind. 568, 70 N. E. 980 (1904)</td>
<td>10,787</td>
<td>13,886</td>
<td>6,943</td>
</tr>
<tr>
<td>Williams v. Secretary of State, 145 Mich. 447, 108 N. W. 749 (1906)</td>
<td>73,063</td>
<td>116,033</td>
<td>52,000</td>
</tr>
</tbody>
</table>

\(^{5}\) State v. Dammann, 209 Wisc. 21, 243 N. W. 481 (1932).

\(^{6}\) People v. Board of Sup'rs., 148 N. Y. 187, 42 N. E. 592 (1890).

\(^{7}\) People v. Rice, 135 N. Y. 473, 31 N. E. 921 (1892); Adams v. Bosworth, 128 Ky. 61, 102 S. W. 861 (1907) [relief denied where a declaration of invalidity would "discourage and disorganize" governmental practices long followed and in which there had been general acquiescence.]
judicial recognition of the political "give and take" involved in the enactment of any reapportionment or redistricting statute.  

C. Judicial Review of Action by Executive Boards. In Missouri, where the duty to redistrict is vested in a board composed of executive officials rather than the legislature, the state supreme court, in a recent decision invalidating a redistricting undertaken by the board, stated that the actions of such officials would be scrutinized more closely, and that they would be permitted far less latitude for the exercise of discretion, than the legislature. In Arkansas, where the state supreme court is constitutionally empowered to "revise any arbitrary action or abuse of discretion" of the apportionment board, the court showed no hesitancy in substituting its judgment for that of the board by not only invalidating the board's action, but also prescribing an entirely new reapportionment of state election districts.

D. Capacity to Raise the Constitutional Issue. Almost all the cases questioning the validity of state acts have been instituted by a petitioner acting in the capacity of a taxpayer and voter who has sought by injunction or mandamus to restrain a state official from performing duties (such as preparing and furnishing ballots) under the allegedly unconstitutional act and to compel the performance of such duties under a prior and allegedly valid act. It is well

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The following extract from People v. Rice, ibid, 929-930, is illustrative of a fairly typical judicial attitude:

"Local pride, commercial jealousies and rivalries, diverse interests among the people, together with a difference of views as to the true interests of the localities to be affected, all these things and many others might have weight among the representatives upon the question of apportionment, so that, in order to accomplish any result at all, compromise and conciliation would have to be exercised. Looking at the act as a result of such circumstances, and (sic) it seems clear that it cannot be said to be so far a violation of legislative discretion as to cause its complete overthrow by the courts."  

Preisler v. Doherty, 284 S. W. 2d 427 (Mo. 1955), action for declaratory judgment.

Ark. Const., Art. VIII, Sec. 5.

Pickens v. Board of Apportionment, 220 Ark. 145, 246 S. W. 2d 556 (1952).

At least one case has held that any state citizen over twenty-one years of age at the time of the last preceding census has standing to sue. Brooks v. State, 162 Ind. 568, 70 N. E. 260 (1904). And, although a minority of the cases take a contrary view, it has been held that it is not necessary to first make application to a state official for the relief sought before bringing the action. Giddings v. Blacker, 53 Mich. 1, 52 N. W. 944 (1892).
settled that one does not have to be a candidate for office to bring such an action, or reside in a district which is unconstitutionally discriminated against by being allotted a disproportionately small representation in the legislature.

E. Consequences of Invalidity. Except where expressly empowered to do so by constitutional provision, the courts have consistently disclaimed any right in themselves to either redistrict or reapportion or to suggest a valid method of performing such functions. Consequently, the effect of declaring a reapportionment or restricting act invalid is to revive the last prior constitutional act. Some courts have explained this result on the ground that the declaration of unconstitutionality includes that part of the more recent act repealing the prior statute. Others have reached the same result by holding that such an act, if valid when enacted, remains in force until supplanted by a subsequent valid act. In either case, the legislature elected under the unconstitutional act is recognized as a de facto (and in some cases, a de jure) body whose legislative acts cannot be collaterally attacked.

Sometimes the effect of invalidating a statutory gerrymander and thereby reviving an earlier act will be to cause greater inequalities among districts than those existing under the act sought to be set aside. Under such circumstances, all relief will be denied where the prior act was also grossly inequitable when enacted; where, on the other hand, the prior act, though fair at the time of its enactment, no longer reflects current population ratios among districts,

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48 Stiglitz v. Schardien, 239 Ky. 799, 40 S. W. 2d 315 (1931).
49 Brooks v. State, supra, n. 42. The denial of fair representation to other state districts is recognized as being just as injurious to the political rights of the petitioner as if the inequalities complained of existed in his own district.
50 Supra, ns. 40-41.
54 Were this not so, it would, of course, be impossible for the current legislature to validly perform its constitutional duty to enact a valid reapportionment or redistricting statute. People v. Board of Canvassers, 129 N. Y. 360, 29 N. E. 345 (1891); People v. Board of Sup'rs, 138 N. Y. 95, 33 N. E. 827 (1893).
55 Denney v. State, 144 Ind. 503, 42 N. E. 929 (1896).
there is a conflict of authority as to whether relief should be granted.\textsuperscript{51}

\textbf{F. Efforts to Compel Legislative Action.} There appears to be no effective judicial remedy to combat those gerrymanders which have arisen due to the protracted failure on the part of about one-half of the state legislatures to enact new reapportionment or redistricting acts at the times specified by their state constitutions.\textsuperscript{52} The most flagrant "passive" gerrymander and the one giving rise to the greatest number of attempts to secure judicial intervention — all of which have met with the same result — resulted from the failure of the Illinois legislature to validly reapportion members of the state General Assembly among legislative districts after 1901, although constitutionally required to do so after each federal census.\textsuperscript{53} In 1926, after the legislature had twice failed to perform its constitutional mandate, an action was brought in which a writ of mandamus was sought to compel the members of the General Assembly to meet and reappoint legislative districts.\textsuperscript{54} The Illinois Supreme Court in \textit{Fergus v. Marks},\textsuperscript{55} held that the constitutional provision in question, although concededly mandatory in nature, was judicially nonenforceable,

\textsuperscript{51} Williams v. Secretary of State, \textit{supra}, n. 48 (greater inequalities of prior act held not to constitute a bar); \textit{Contra:} Jones v. Freeman, 193 Okl. 554, 146 P. 2d 564 (1943), \textit{app. dis.} 322 U. S. 717 (1944).

\textsuperscript{52} The results of a survey conducted in 1941 (Shull, \textit{Reapportionment: A Chronio Problem}, 30 Nat. Munic. Rev. 73, 77-8) revealed that only about fifty per cent of the states might be classified as having an up to date apportionment within the preceding ten years. The last prior apportionment in eight states had taken place from 1920 to 1925. In four states, the last apportionment had been between 1901 and 1917, and two states had not reapportioned since 1893.

\textsuperscript{53} Art. IV, Sec. 6 of the Illinois Constitution of 1870. In \textit{People v. Carlock}, 198 Ill. 150, 65 N. E. 109 (1902), the Supreme Court of Illinois held that the districts created by the 1901 Act [Jones Ill. Stats. Ann. (1944 Rev., Vol. 1), Secs. 43.150-43.156] were not so grossly unequal in population as to constitute an abuse of legislative discretion. See \textit{supra}, n. 10, with regard to the extent of inequalities among districts after the 1950 census. A redistricting statute was enacted in 1831, but was invalidated in Moran v. Bowley, 347 Ill. 148, 179 N. E. 526 (1932), because of the inequalities among the districts it established.

\textsuperscript{54} See note, 46 Harv. L. Rev. 137 (1926), pointing out that \textit{Fergus v. Marks}, \textit{infra}, n. 55, was the first case in this country in which the question of a mandamus to the legislature had arisen.

\textsuperscript{55} 321 Ill. 510, 152 N. E. 557 (1926).
the legislature being solely accountable to the people for its failure to perform.\(^{56}\)

Other attempts down through the years have likewise proven unavailing. Thus, in *Fergus v. Kinney*,\(^ {57}\) the same petitioner brought suit to enjoin the State Treasurer from paying the salaries and expenses of the members of the legislature on the ground that the failure to reapportion prevented the legislature from being a legally constituted body. Once again relief was denied, the Court stating that it would not do indirectly what it had previously declined to do directly.\(^ {58}\) In *People v. Blackwell*,\(^ {59}\) the Court similarly refused to question the legality of legislative authority on *quo warranto* directed to the members of the legislature. In *People v. Clardy*,\(^ {60}\) the court summarily rejected the contention that a criminal conviction should be set aside because the legislature which enacted the statute under which the conviction was obtained had not been legally elected due to the failure to reapporion.\(^ {61}\) In *Keogh v. Neely*,\(^ {62}\) an attempt was made to restrain the United States Collector of Internal Revenue from collecting federal income taxes in Illinois, it being claimed among other things, that due to the failure of the federal government to compel the Illinois legislature to reapporion, it had denied to the people of Illinois the constitutional guaranty of a republican

\(^{56}\) Accord: *State v. Zimmerman*, 249 Wis. 101, 23 N. W. 2d 610 (1946); *In re State Census*, 6 S. D. 540, 62 N. W. 129 (1895), advisory opinion. It has for the same reason been held in two cases that mandamus will not lie against a state official to compel him to prepare ballots and conduct an election as if an equitable apportionment were in effect when the state legislature has failed to perform its constitutional duty. *Latting v. Cordell*, 197 Okl. 369, 172 P. 2d 397 (1946); *Burns v. Flynn*, 155 Misc. 742, 281 N. Y. S. 494, 497 (1935), affd. 268 N. Y. 601, 198 N. E. 424 (1935).

\(^{57}\) 333 Ill. 437, 164 N. E. 665 (1928).

\(^{58}\) *Ibid.* In *Morrow v. City of Cleveland*, 72 Oh. App. 460, 56 N. E. 2d 333 (1943), the court refused to enjoin the payment of the salaries of the members of the City Council holding that the failure of the Council to redivide the city into wards in accordance with a city charter provision did not invalidate the Council offices in view of a charter provision continuing existing wards until new ones were established. The Court also said that even without such a charter provision, the issue was a purely political one in which the Court should not interfere.

\(^{59}\) 342 Ill. 223, 173 N. E. 750 (1930).

\(^{60}\) 334 Ill. 160, 165 N. E. 638 (1929).


\(^{62}\) 50 F. 2d 685 (7th Cir., 1931), *cert. den.* 284 U. S. 583 (1931).
form of government to thereby relieving Illinois citizens from the payment of federal income taxes. The Circuit Court of Appeals for the Seventh Circuit held the contention to be without merit, stating that even assuming that the federal government could require the Illinois legislature to obey the state constitution, failure to do so would not relieve its citizens of the burdens imposed upon them by the federal Constitution.

In two other states, indirect attempts have been made to compel legislative action by seeking judicial invalidation of existing apportionment statutes on the ground that the failure of the state legislatures to reapportion had resulted in such inequalities in population among districts as to make the acts in question unconstitutional at the time of suit, although they may have been valid when enacted. In both instances, the courts have disclaimed the power to grant relief, on the basis that the legislature bore sole responsibility for obeying the constitutional mandate, and that the proper province of the judiciary was limited to determining the legality of legislative acts when enacted.

G. Compelling Action by Executive Officials. The reasons for refusing to intercede where the legislature is involved have been held not to exist in those states where the responsibility to reapportion or redistrict has been entrusted to administrative officials. If such officials fail to act within the required time, mandamus has issued directing them to do so. Mandamus has likewise been granted in a majority of the decided cases to require the subdivision of counties into new election districts by local administrative boards charged with such duties, even though the function of apportioning representatives among each of the

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83 U. S. Const., Art. IV, Sec. 4.
84 For cases involving the gerrymandering of Illinois Congressional districts, see infra, ns. 80-93. The Illinois legislature finally passed a redistricting act in 1955, which was held valid in Donovan v. Holzman, 8 Ill. 2d 87, 132 N. E. 2d 501 (1956).
85 Smith v. Holm, 220 Minn. 486, 19 N. W. 2d 914 (1945); State v. Howell, 92 Wash. 540, 159 P. 777 (1916). See dicta to the same effect in State v. Zimmerman, supra, n. 56.
III. GERRYMANDERING OF FEDERAL CONGRESSIONAL DISTRICTS

A. Constitutional Provisions. Two sections of the Federal Constitution relate to the apportionment of members of the House of Representatives. Section Two of the Fourteenth Amendment provides that Representatives should be apportioned among the States according to population, excluding untaxed Indians, and the third paragraph of Article One, Section Two provides for a reapportionment of Representatives every ten years in such manner as Congress shall direct.

Authority for Congress to prescribe the method of redistricting to be observed within the states for Congressional elections is contained in the first paragraph of Article One, Section Four of the Constitution which provides that, "The Times, Places, and Manner of holding Elections for Senators and Representatives shall be pre-

Attorney General v. Suffolk County Apportionment Comm'rs., 224 Mass. 598, 113 N. E. 581 (1916). [The court stated that mandamus was appropriate to set aside the illegal performance of duty and to compel performance when there is a corresponding duty to act. Although not referred to by the court, there is a Massachusetts Statute which would seem to specifically authorize mandamus in such a case. Mass. Ann. Law, Ch. 56, Sec. 59]; Ball v. King's County, 138 N. Y. 95, 33 N. E. 827 (1893). Cf. Board of Sup'rs. of Maricopa County v. Pratt, 47 Ariz. 536, 57 P. 2d 1220 (1938) and Carpenter v. Board of Apportionment, 218 Ark. 404, 236 S. W. 2d 582 (1951), in both of which mandamus was denied because the Court found no duty to redistrict at the time suit was brought, without discussing whether the board was subject to mandamus. Contra: State v. Hitchcock, 241 Mo. 433, 146 S. W. 40 (1912) [holding that such a board was for this purpose a "miniature legislature" and therefore not amenable to mandamus.] Under the present reapportionment statute [46 Stat. 26 (1929), as amended 54 Stat. 162 (1940) and 55 Stat. 761 (1941) ; 2 U. S. C. A. Sec. 2a (1956 Supp.)] the President, after each decennial census, submits a statement to Congress showing the population of each state and the number of representatives to which it is entitled. The mathematical formula of apportionment now prescribed is the "equal proportion" method. See Chafee, Congressional Reapportionment, 42 Harv. L. Rev. 1015 (1929). The present act, passed in 1929, is designed to avoid deadlocks between the Senate and House, such as the one which occurred after the 1920 census when Congress failed to enact a new apportionment. Although no direct attempt was made to compel Congress to reapportion, the view has often been expressed that the courts are powerless to intervene. Chafee, ibid.; Colegrove v. Green, 328 U. S. 549, 555 (1946). The question was raised indirectly in a state court and answered in the negative. State v. Boyd, 36 Neb. 181, 54 N. W. 252 (1893).
scribed in each State by the Legislature thereof; but the
Congress may at any time by Law make or alter such Regu-
lations except as to the Places of choosing Senators." 69

B. Absence of Federal Statutory Regulation. By means
of successive apportionment statutes enacted approximately
every ten years from 1842 until 1911, Congress provided
that in each state entitled to more than one member, the
state's representatives "shall be elected by districts com-
posed of a contiguous and compact territory and containing
as nearly as practicable an equal number of inhabitants".70
After the census of 1920, the two Houses of Congress were
unable to reach agreement on a new reapportionment
statute and it was not until 1929 that a new statute was
passed. The 1929 Act 71 contained no requirements of con-
tiguity, compactness or approximate equality of population,
nor did it contain a provision expressly repealing the
1911 Act. 72

In Wood v. Broom, 73 a suit challenging an alleged gerry-
mander of Mississippi Congressional districts prior to the
1932 elections, the Supreme Court, in an opinion written
by Mr. Chief Justice Hughes, held that the requirements of
compactness, contiguity and approximate equality of popu-
lation had "expired by their own limitations". 74 The Court
viewed the legislative history of the 1929 Act as showing
a deliberate Congressional intent to omit the safeguards of
the Act of 1911. Although the District Court in which the

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69 There is nothing in the Federal Constitution which requires that Con-
gressmen representing states apportioned more than one representative be
elected from geographically distinct Congressional districts. Although Con-
gress has at various times enacted legislation requiring election by single
member districts, the current Apportionment Act, ibid, contains no such
requirement. Two states (New Mexico and North Dakota) elect their two
members of the House at large, while two others (Washington and Con-
necticut) have districts, but also elect one at large member. All of the
other states, including Maryland, elect representatives from single member
districts. Md. Code (1951), Art. 33, Secs. 129-136, sets forth the composition
of Maryland's seven Congressional districts.

70 The 1911 Act was 37 Stat. 14, 2 U. S. C. A. 3.
71 Supra, n. 68.
72 The repeal provision in the 1929 Act was the "blanket" type repealing
all other laws and parts of laws inconsistent with it.
73 287 U. S. 1 (1932).
74 Three state courts had previously held that the requirements of the
1911 Act were still in effect. Moran v. Bowley, 347 Ill. 148, 179 N. E. 526
(1932); Koenig v. Flynn, 258 N. Y. 292, 179 N. E. 705 (1932); Brown v.
Saunders, 159 Va. 28, 166 S. E. 105 (1932).
suit had been brought had found that the challenged districts were neither compact, contiguous, nor approximately equal in population, the Court refused, in the absence of any federal statutory regulations, to declare the act invalid. Four Justices concurred in the result on the separate ground that the bill should have been dismissed for want of equity.

Although efforts have been made at various times since the Wood decision to reimpose the standards set forth in the 1911 Act, or to provide other statutory safeguards to check Congressional gerrymandering, none has met with success.

C. Failure of Attacks Based on Federal Constitutional Provisions. The flagrant Illinois gerrymander, which figured prominently in litigation involving the gerrymandering of state legislative districts, was also responsible for the first constitutional attack upon the gerrymandering of federal Congressional districts to reach the Supreme Court. In

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76 Mr. Justice Brandeis, Mr. Justice Stone, Mr. Justice Roberts and Mr. Justice Cardozo.
77 They pointed out that the lower court and all of the parties had assumed that the 1911 Act was still in effect. The majority expressly declined passing upon the justiciability of the controversy.
78 In 1939, a Bill (H. 5069, 76th Cong.) was introduced which provided that, if the population of the largest district exceeded that of the smallest by more than fifty per cent, all representatives from the state should be elected at large until new districts in conformity with the statutory requirements were established. On January 9, 1951, upon submitting the new reapportionment of Representatives, President Truman, in a special message to Congress urged the reenactment of the standards contained in the 1911 Act, and also suggested that Congress provide by statute for some maximum deviation in population among districts. New York Times, January 10, 1951, page 22. Two bills were subsequently introduced in the Eighty-second Congress to accomplish these objects. The first (H. 2648) provided for a maximum variation in population among state districts of 15% above or below the number obtained by dividing the state's total population by the number of representatives apportioned to it; any Congressmen elected from a district which did not conform to this standard would be denied his seat. The second (H. 6165) provided that in any case or controversy arising under the Apportionment Act, "it shall not be a defense or a jurisdictional objection that the issues are of a political nature".
79 Supra, ns. 53-64.
80 The same districts from which members of the state legislature were elected were also used for Congressional elections. In Daly v. Madison County, 378 Ill. 357, 38 N. E. 2d 160 (1941), the Supreme Court of Illinois, relying on Wood v. Broom, supra, n. 73, held that there were no federal statutory or constitutional restrictions upon Congressional districting. (The federal constitutional issue was not, however, decided in the Wood case. It was not raised by the petitioners who had assumed that the 1911 Apportionment Act requirement of approximate equality in population was still
Colegrove v. Green, suit was brought under the Federal Declaratory Judgment Act to enjoin Illinois officials from proceeding with the 1946 Congressional elections under the 1901 Illinois Act. The case produced a three-way split among the seven justices who heard it. Three Justices thought the case might be disposed of on the same grounds as Wood v. Broom. The Federal Declaratory Judgment Act, not available at the time of the Wood case, was deemed by them to be merely a new procedural device which did not enlarge the scope of equitable relief which federal courts were empowered to grant. These three Justices also agreed with the minority in the Wood case who thought that the bill should have been dismissed for want of equity. The suit was moreover thought by them to involve no private wrong, but merely a "wrong suffered by Illinois as a polity". The question was deemed political inasmuch as the Constitution was viewed as having granted to Congress exclusive authority over the subject matter of the suit.

A fourth Justice concurred in the dismissal of the suit, on the ground that the Court should not as a matter of discretion grant relief, although, he viewed the issue raised by the petition as being justiciable in equity.

The remaining three Justices dissented, taking the position that the question was justiciable and that the appellants had suffered personal harm entitling them to equitable intervention. The effect of the 1901 Illinois Act was considered by them to work a denial to the appellants of the equal protection of the laws guaranteed by the Fourteenth Amendment. It was also deemed to constitute a violation applicable.) The court also held that, if the 1901 Illinois Apportionment Act, was valid when enacted, it could not become invalid due to subsequent events.

328 U. S. 549 (1946).
Chief Justice Stone died before the case was decided, and Justice Jackson did not participate.
Justices Frankfurter, Reed and Burton.
Supra, n. 73.
Supra, n. 81, 552.
Justice Rutledge.
Justices Black, Douglas and Murphy.
of the privileges and immunities clause in abridging appellants' privilege as citizens to vote for Congressmen under Article I of the Constitution.\textsuperscript{90}

Thus, a majority of the Court (composed of the three dissenters and the concurring justice) were of the opinion that the issue was one where equity properly might assume jurisdiction. Moreover, the same majority felt that the Wood case was not determinative of the constitutional issues. The Court's dismissal of the action is therefore attributable to the view of one Justice that under the circumstances equity should not exercise jurisdiction.\textsuperscript{91}

In Colegrove v. Barrett,\textsuperscript{92} the same petitioner brought suit to enjoin all future Congressional elections in Illinois under the 1901 Act instead of the one election sought to be enjoined in Colegrove v. Green.\textsuperscript{93} The Supreme Court, dismissed the appeal "for want of a substantial federal question". The same three Justices who had dissented in the

\textsuperscript{90} Petitions for rehearing and for reargument were denied by the same seven Justices who had heard the case. 329 U. S. 825, 828 (1946).

\textsuperscript{91} In Remmey v. Smith, 102 F. Supp. 708, 710 (opinion, fn. 11) (E. D. Pa., 1951), app. dis. 342 U. S. 916 (1952), Judge Biggs observed that "The language employed (in the Colegrove case) would seem to indicate that the questions presented related to the exercise of judicial power rather than to the possession of the power to adjudicate." (Parenthetical material supplied.)

\textsuperscript{92} 330 U. S. 804 (1947).

\textsuperscript{93} The effort to enjoin all future elections was obviously designed to obviate the opinion expressed by Justice Rutledge in his concurring opinion in Colegrove v. Green, that due to the shortness of time before the 1946 elections, the granting of relief in that case might result in more harm than good by forcing an at large election. [328 U. S. 549, 565-6 (1946)]. It was perhaps also thought that either Chief Justice Vinson, who had been recently appointed, or Justice Jackson, who did not participate in Colegrove v. Green, or both of them, would take the side of the dissenters in that case. However, in Colegrove v. Barrett, \textit{ibid}, neither of these Justices voted to note probable jurisdiction and Justice Rutledge concurred in the dismissal of the petition "[I]n view of the Court's refusal to grant rehearing in Colegrove v. Green ... and its dismissal of the appeals in Cook v. Fortson and Turman v. Duckworth, 329 U. S. 675 ..." These latter two [68 F. Supp. 624 (N. D. Ga., 1946) and 68 F. Supp. 744 (N. D. Ga., 1946)] were actions seeking to enjoin the use of the Georgia county unit vote rule in federal as well as state elections on the ground that the unit vote system constituted a violation of the equal protection clause of the Fourteenth Amendment. On a consolidated appeal, the Supreme Court dismissed both, citing United States v. Anchor Coal Co., 279 U. S. 812 (1929), a case involving Supreme Court procedure for the dismissal of appeals involving moot issues. In the note, \textit{Injunctive Protection of Political Rights in the Federal Courts}, 62 Harv. L. Rev. 659, 662 (1949), fn. 26, it is stated that the Cook and Turman appeals were probably denied because the election had already been held, suggesting this as a reason for Colegrove's second suit to enjoin future elections.
first case were of the opinion that probable jurisdiction should have been noted.

Although roundly criticized, the Colegrove doctrine of judicial non-intervention in gerrymandering disputes was followed and extended to other related fields in two subsequent cases coming before the court during the 1948 and 1950 election campaigns. In MacDougall v. Green, the Progressive Party sought to enjoin the operation of a 1935 Illinois statute requiring petitions to form and nominate candidates for new political parties to be signed by at least 25,000 voters including 200 from each of 50 of the state's 102 counties. Because of the grossly uneven distribution of population among counties, it was contended that the statute worked a denial of equal protection of the laws by allowing less populous counties to prevent the formation of a new party. The Supreme Court, in a Per Curiam opinion denying relief, stated:

"To assume that political power is a function exclusively of numbers is to disregard the practicalities of government... It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution — a practical instrument of government — makes no such demands on the States."

In South v. Peters, decided in 1950, an attempt was made to enjoin the operation in a primary election of the

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95 335 U. S. 281 (1948).

96 Ibid, 283-4. Five members of the Court voted to affirm the Lower Court which had dismissed the action for want of jurisdiction. Justice Rutledge again concurred because of the shortness of time before the election. Justices Douglas, Black and Murphy once again dissented.

Georgia "county unit vote" statute, which combined with gross population disparities among counties, resulted in the votes of residents of the most populous Georgia county receiving approximately one-eleventh the weight of the average votes of residents of other counties. In a two paragraph Per Curiam opinion, the Supreme Court affirmed the dismissal of the petition by the lower court, and stated flatly that "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions".

Recently, however, a case arose in the United States District Court for Hawaii, which may mark a reversal of the prior judicial trend. In a lengthy opinion delivered in February, 1956, Chief Judge McLaughlin, speaking for the court in Dyer v. Kazuhisa Abe, denied a motion to dismiss a complaint by a territorial voter to compel the Hawaii legislature to reapportion representatives. The court did not consider itself bound by the Colegrove cases inasmuch as no state-federal relationship was involved. Even if this were not so, the court stated that, in view of several precedent shattering Supreme Court decisions in recent years invalidating any discriminations based upon race, creed or color even though countenanced by state law, the time

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88 The statute awarded all of a county's unit votes (ranging from two to six among counties) to the candidate receiving the largest popular vote in the county.

89 Supra, n. 97, 277. The MacDougall, Colegrove and Wood decisions were cited. Justices Douglas and Black dissented. Other federal cases in related fields have followed the lead of the Colegrove cases in classifying election matters as political: Vermilya-Brown Co. v. Connell, 335 U. S. 377, 380 (1948); Rescue Army v. Municipal Court, 331 U. S. 549, 570 (1946); Caven v. Clark, 78 F. Supp. 295 (W. D. Ark., 1948); Cook v. Fortson, supra, n. 93. See also Dennis v. United States, 171 F. 2d 986 (D. C. Cir., 1948), affd. 339 U. S. 162 (1950), reh. den. 339 U. S. 950 (1950), a criminal prosecution for failure to respond to a subpoena of the House Committee on Un-American Activities; and Saunders v. Wilkins, 152 F. 2d 235 (4th Cir., 1945), cert. den. 328 U. S. 870 (1946), a suit for damages against the Secretary of State of Virginia for failure to certify plaintiff's candidacy for Congress. In both cases, it was asserted that state poll taxes violated the Fourteenth Amendment by abridging the rights of citizens to vote. In the Dennis case, this issue was raised in the lower court, it being contended that the Chairman of the House Committee had not been constitutionally elected.

had come when the judiciary should not refuse to intervene where the discrimination complained of was based upon an inequitable arrangement of election districts.

D. Right of the House of Representatives to Exclude Member Elected From Gerrymandered District. The Constitution provides that "Each house shall be the Judge of the Elections, Returns and Qualifications of its Members." Acting under this authority, Congress has upon two occasions investigated elections which have been challenged because of alleged gerrymanders of election districts in the state in which the challenged member was elected. Despite the fact that, in one of the cases, a majority of the House Committee which conducted the investigation found that the state redistricting statute in question was contrary to the requirements of contiguity, compactness and approximate equality of population contained in the Apportionment Act of 1901 and recommended that the challenge be upheld, the House refused in both cases to exclude the challenged member.

Although the opinion of the court in the first Colegrove case strongly suggested that the House of Representatives itself (even in the absence of such statutory standards as were contained in the 1901 Act) has power to exclude a member elected from a gerrymandered state, the prospect of successfully challenging a Congressional election on this basis, appears to be highly improbable. The Houses of Congress have been traditionally reluctant to exercise their power to exclude the candidate who is certified by the state as its duly elected representative. To do so in a case where

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103 Davidson v. Gilbert, reported in Powell, Digest of Contested Election Cases (1910) 603-5, and Parsons v. Saunders, reported in Moore, Digest of Contested Election Cases (1917) 43.
104 Parsons v. Saunders, ibid.
105 The Supreme Court has held that there are no such requirements in the present Act, supra, n. 68, discussed supra, ns. 70-78.
106 328 U. S. 549, 554, 556 (1946): "The short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility.

"The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress." (Italics supplied.)
the challenge was based upon a charge of gerrymandering would be setting a precedent which conceivably might lead to election contests from a majority of the states. Even if the power were exercised, it is likely that the Congressmen would vote on a purely partisan basis. Moreover, in gerrymandering contests there is the further practical difficulty that, unlike the ordinary contested election, a valid federal election could not be held until such time as the legislature had acted to correct the deficiencies in its districting arrangement.

E. Congressional Power to Redistrict Gerrymandered States. The doubts once expressed as to whether Congress possessed constitutional authority to require that Congressional districts conform to certain general standards, such as those embodied in the Apportionment Act of 1911, have now been dispelled. While Congress has never attempted to go further and actually redistrict a state, the Supreme Court has frequently said that under Article I, Section 4 of the Constitution, Congress exercises “a general supervisory power over the whole subject” of Congressional elections, such as to empower it to enact legislation “of the same general character that the legislature of the State is authorized to prescribe.”

Eminent authorities writing

107 The Majority Report in the contested election case of Davidson v. Gilbert and the Minority Report in Parsons v. Saunders, supra, n. 108, expressed the view that Congress had no such power. Before the 1842 Act was passed, the report of the Senate Committee to which it was referred, also denied that Congress possessed such power. Senate Document 119, 22nd Cong., 1st Sess.
108 Supra, n. 70.
109 In Colegrove v. Green, supra, n. 106, 555, Mr. Justice Frankfurter, after referring to the requirement in the Act of 1842 that elections to Congress be by districts, states: “Strangely enough, the power to do so was seriously questioned; it was still doubted by a Committee of Congress as late as 1901.” As early as 1880, in Ex Parte Siebold, 100 U. S. 371, 384 (1879), the Court said:

“Congress has partially regulated the subject heretofore. In 1842, it passed a law for the election of representatives by separate districts; and, subsequently, other laws fixing the time of election, and directing that the elections shall be by ballot. No one will pretend, at least at the present day, that these laws were unconstitutional because they only partially cover the subject.”

110 Ex parte Siebold, ibid; Ex parte Yarborough, 110 U. S. 651 (1884); Ex parte Clarke, 100 U. S. 399 (1879); United States v. Mosley, 238 U. S. 383 (1915); Newberry v. United States, 256 U. S. 232 (1921).
in the law journals have expressed the opinion that Congress' regulatory powers over federal elections embraces the authority to enact federal redistricting laws.

Whether or not it would be wise for Congress to exercise such authority, assuming it to exist, is another matter. The view has been expressed that the present system of individual state gerrymandering is preferable to gerrymandering on a national scale which may be the consequence of a federal act. On the other hand, it has been suggested that the danger of gerrymandering would probably be less in Washington than in the state legislatures due to the relatively greater amount of publicity afforded Congressional activities.

Were Congress to enact such a statute, it would be faced with at least two imposing difficulties. If a federal redistricting act were passed without taking into account the practice in many states of electing state and federal officials from the same districts, such formidable administrative difficulties might result as to require the holding of separate state and federal elections. A similar obstacle to Congressional districting is the custom of never redistricting a state so that an incumbent's residence will be outside the new district. These two practical, if not legal, impediments to equitable districting would have to be given serious thought before any federal redistricting scheme were attempted.

F. Attacks Based Upon State Constitutional Provisions. Appellate tribunals in two states have held that a Congressional gerrymander which violates a state constitu-

112 Bowman, Congressional Redistricting and the Constitution, 31 Mich. L. Rev. 149, 177-178 (1932); Chafee, Congressional Reapportionment, 42 Harv. L. Rev. 1015, 1016 (1929), fn. 4.

113 Bowman, ibid, 179.

114 Schmeckebier, CONGRESSIONAL APPORTIONMENT (1941) 143. He also points out that the reports and files of the Census Bureau contain all the statistical and geographical data necessary for districting the states.

115 The Constitution merely requires that Representatives reside in the state they represent. Art. I, Sec. 2. Some of the states provide by statute that a Representative must reside in the Congressional district from which he is elected. The Maryland Law imposes no such requirement. Md. Code (1951), Art. 33, Secs. 129-136.

tional standard of approximate equality of population will be overthrown. Although the courts in both instances relied upon the limitations imposed upon Congressional districting by the 1911 Federal Apportionment Act (which they held to still be in force), both also took the position that the same result would follow because of similar limitations found in the constitutions of the states themselves. Lending support to the latter view are Supreme Court decisions which have uniformly held that other state constituted provisions relating to Congressional districting may (in the absence of contrary federal regulations) validly be applied to Congressional districting.

There thus is ample precedent for the review of Congressional districting acts for compliance with standards, such as compactness, contiguity, and approximate equality of population, in those relatively few states whose constitutions contain such checks upon legislative authority. While an avenue of possible judicial intervention in Congressional districting would be provided by the adoption of like provisions in more of the states, it would seem that the state legislatures, who are responsible for the prevalence of Congressional gerrymandering, are hardly likely to initiate constitutional amendments designed to proscribe such a favored political device.

117 Both cases were decided before Wood v. Broom, 287 U. S. 1 (1932), in which the Supreme Court held that the limitations contained in the 1911 Act were no longer in effect. See supra, nn. 70-78.

118 Smiley v. Holm, supra, n. 111 [Congressional redistricting act held subject to gubernatorial veto power]; accord: Carroll v. Becker, 285 U. S. 380 (1932); Koenig v. Flynn, 285 U. S. 375 (1932); Davis v. Ohio, 241 U. S. 565 (1916) [Congressional redistricting act held subject to popular referendum].

119 While the Maryland Constitution contains no such express provisions, it might be contended that gerrymandering violates the spirit, if not the letter, of Article 7 of the Declaration of Rights, which provides:

"That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose elections ought to be free and frequent, and every male citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage."

Federal election districts are provided for by statute in Maryland. Supra, n. 115.
IV. CONCLUSION

For the most part, attempts to secure effective judicial relief against the gerrymandering of legislative districts have been stymied by the reluctance of the courts to intervene in a field which traditionally has been considered to be the special province of the legislature. Although, on the state level, the courts will review legislative reapportionment and redistricting acts for compliance with state constitutional safeguards of compactness, contiguity and equality of population, only those acts which reflect a gross abuse of legislative discretion have been invalidated. Moreover, in the all too frequent instances where gerrymanders have resulted from legislative failure to reapportion or redistrict in order to meet shifts in population over the years, the courts have consistently refused to intervene.

On the federal level, the absence of such statutory safeguards as are contained in most of the state constitutions and judicial reluctance to upset the delicate balance of federal-state relations, have resulted in the classification of gerrymandering as a political question. Congressional failure, especially since the Colegrove decisions, to reenact into law the standards contained in the Apportionment Acts up to 1911 may be viewed as a manifestation of legislative policy approving judicial non-intervention. Consequently, the current status of the law would seem to permit the un fettered exercise of discretion by the state legislatures in Congressional districting, subject only to state constitutional restrictions, if any, and the right of the House to judge the qualifications of its members.

In view of this existing judicial impotency, the question arises as to what means are available to assure an equitable legislative basis of representation. Probably the most direct, and perhaps the most effective means of accomplishing this result, lies in the awakening of popular interest by means of publicizing the inequities of the present apportionment and districting arrangements in most of the states. Once this interest has been aroused, the voters not only have the power to elect candidates who will enact procedural
reforms and eliminate outmoded and consequently unfair distributions of electoral strength, but also, in many states, the power to themselves initiate and secure such reforms.\textsuperscript{120} In the same manner that national criticism of the Congressional failure to reapportion the states after the 1920 census led to the adoption of the present system of automatic reapportionment after each federal census,\textsuperscript{121} the enlightenment of the voters in the individual states may lead to the adoption of similar safeguards designed to reduce the possibility of future gerrymandering at the state level. One such safeguard would be to divest the state legislatures of the power to reapportion and redistrict and designate an executive body (subject to judicial compulsion) to perform either or both of these functions. Another would be the adoption by more of the states of the minimal constitutional standard of approximate population equality among Congressional districts. Other possible constitutional and statutory reforms are available and lie ready to be tested in the political laboratories of the individual states.\textsuperscript{122}

Gerrymandering strikes at one of the mainsprings of our democratic system of government. Only after it has been eliminated will our legislatures regain their truly representative character.

\textsuperscript{120} See \textit{e.g.}, Webster, \textit{Voters Take the Law in Hand}, 35 Nat. Munic. Rev., 240-5 (1946), relating how an equitable apportionment was obtained by the voters in the State of Washington through the use of the initiative and referendum.

\textsuperscript{121} \textit{Supra}, n. 68.

\textsuperscript{122} Symposium on Legislative Apportionment, 17 \textit{Law and Contemp. Prob.} 253 (1952), especially the following articles: Harvey, \textit{Reapportionment of State Legislatures — Legal Requirements}, 364-376; Short, \textit{States That Have Not Met Their Constitutional Requirements}, 337-396; Bone, \textit{States Attempting to Comply with Reapportionment Requirements}, 387-416.